



are available are exhausted.” Exhaustion of all administrative remedies as set forth by the Missouri Department of Corrections Offender Grievance Procedures must be completed prior to a prisoner filing suit. See Johnson v. Jones, 340 F.3d 624, 628 (8<sup>th</sup> Cir. 2003) (dismissal is required under section 1997e(a) if an inmate has failed to exhaust all available administrative remedies *prior* to filing suit). When multiple prison conditions claims have been joined, the plain language of section 1997e(a) requires that all available prison grievance remedies must be exhausted as to all claims on which a prisoner is seeking relief. Graves v. Norris, 218 F.3d 884, 885 (8<sup>th</sup> Cir. 2000) (per curiam). Exhaustion of all administrative remedies means that a prisoner must use all steps that the Department of Corrections requires and must follow such steps properly. Woodford v. Ngo, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2378 (2006) (section 1997e(a) requires proper exhaustion of administrative remedies). A prisoner must complete the administrative review process in accordance with applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court. *Id.*

Defendants state that although plaintiff exhausted his excessive-use-of-force claims against Branum, plaintiff has failed to file any grievance regarding his claims against Murphy, and therefore, his claims should be dismissed in their entirety because exhaustion is required as to all claims on which a prisoner is seeking relief.

Upon review, the court finds the motions of defendants Murphy and Branum for dismissal have merit. However, the Eighth Circuit has held that despite a plaintiff’s failure to exhaust administrative remedies as to all his claims, a plaintiff should be permitted to file an amended petition which includes only exhausted claims. Kozohorsky v. Harmon, 332 F.3d 1141, 1144 (8<sup>th</sup> Cir. 2003). Accordingly, this court will grant plaintiff ten days from the date of this order to file an amended complaint including only his exhausted claims of excessive use of force against defendant Branum.

IT IS, THEREFORE, ORDERED that plaintiff is granted ten days from this date in which to file an amended complaint, containing only exhausted claims against defendant Branum. It is further

RECOMMENDED that if plaintiff fails to file such amended complaint in a timely manner, defendant Branum’s motion to dismiss be granted and plaintiff’s claims against Branum

be dismissed, without prejudice, for failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e [13]. It is further

RECOMMENDED that defendant Murphy's motion to dismiss be granted, and plaintiff's claims against Murphy be dismissed, without prejudice, for failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e [15].

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to this recommendation within twenty days. The District Judge will consider only exceptions to the specific proposed findings and recommendations of this report. Exceptions should not include matters outside of the report and recommendation. Other matters should be addressed in a separate pleading for consideration by the Magistrate Judge.

The statute provides for exceptions to be filed within ten days of the service of the report and recommendation. The court has extended that time to twenty days, and thus, additional time to file exceptions will not be granted unless there are exceptional circumstances. Failure to make specific written exceptions to this report and recommendation will result in a waiver of the right to appeal. See L.R. 74.1(a)(2).

Dated this 11<sup>th</sup> day of January, 2007, at Jefferson City, Missouri.

/s/ William A. Knox

WILLIAM A. KNOX  
United States Magistrate Judge